No. 55016-4

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION II

State of Washington,

Respondent,

v.

Fernando A. Celaya,

Petitioner.

PERSONAL RESTRAINT PETITION

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Status of Petitioner

Petitioner Celaya in the custody of the Department of Corrections, serving a sentence of 84 months after being convicted of two counts of Assault 4, violating a no contact order, and tampering with a witness. According to the Vine system, he will be released around March 23, 2022. An offender incarcerated in a correctional facility is necessarily confined and thus under restraint. *In re Personal Restraint of Stuhr*, 186 Wn.2d 49, 52, 375 P.3d 1031 (2016).

Grounds for Relief

Celaya's continued restraint is unlawful because his conviction and sentence violates the Constitutions of the United States and Washington and the laws of the State of Washington. RAP 16.4(c)(2)(3)(5)(6). Celaya seeks relief from his restraint based on the following legal claims.

Ground One: Celaya received ineffective assistance of counsel when trial counsel failed to move for dismissal after the State committed misconduct. The State's misconduct was misrepresenting the law to the trial court, on the day of trial. On the basis of the misrepresentation, the State was allowed to amend to add a charge of witness tampering, and Celaya was forced to waive his speedy trial right to properly defend against the new charge. Despite the misrepresentation of law, trial counsel did not move to dismiss.

Ground Two: Celaya's right to a speedy trial was violated and he received ineffective assistance of counsel when counsel failed to move for dismissal based on a violation of his right to a speedy trial.

Introduction

On the day of trial, prosecutors misled the trial court about why the State waited to amend charges. The State said it needed to secure a witness's testimony to add the charge of Witness Tampering, supposedly because that witness would testify that a threat had been conveyed. But at trial, in closing argument, and in the jury instructions, the State correctly noted that the witness was unnecessary, because the alleged threat need not be conveyed to the victim to convict.

The State's late amendment placed Celaya in a situation where he had to choose between being unprepared for trial or sacrificing his speedy trial rights. The trial court relied on the State's misrepresentation in granting the amendment. Celaya's trial counsel failed to discover this misrepresentation of law and failed to move to dismiss based on the State's misconduct.

Celaya also received ineffective assistance of counsel because his lawyer did not move to dismiss based on a violation of his speedy trail rights.

Our courts have repeatedly found a constitutional violation where, as here, the State has all the information it needs to file amended charges for months and months but waits to amend until the day of trial—and that amendment forces the defendant to choose between his speedy trial rights and his right to prepare a defense. In *State v. Michielli*, 132 Wn.2d 229, 245-46, 937 P.2d 587 (1997), as here, the State knew all the facts underlying the late amendment well before trial. 132 Wn.2d at 243. Just as

in *Michielli*, here the "State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b)." 132 Wn.2d at 145.

Despite this well-settled law, Celaya's counsel failed to move to dismiss.

As a result of these failures to move to dismiss, Celaya faced a trial that should not have happened and faced the additional charge of witness tampering. Because there was no motion for dismissal, the court of appeals did not rule on Celaya's claims, finding that they were waived. But for Celaya's counsel's failure to move for a mistrial, Celaya would not be in prison today.

This Court should grant the Personal Restraint Petition and remand with instructions to dismiss all charges against Celaya.

Statement of the case

Celaya was arrested in mid-June 2017 and charged with Felony Harassment and Assault 2. CP 3.

A. Pretrial proceedings

Beginning in July 2017, the trial date was continued several times, and trial did not begin until April 17, 2018.

On August 18, 2017, the State submitted its list of witnesses. It include Brien Pace, the witness the State would rely on in seeking to amend charges on the day of trial on February 8, 2018. CP 8. That August

list also included Torvald Pearson, who would testify at trial to authenticate the recording of the allegedly threatening call. CP 9. Indeed, Pearson testified at trial that he had made the CD of the call that would become an exhibit at trial on August 11, 2017. RP 4/24 at 132. Finally, the witness list included the alleged victim, Kaleena Jeffries. CP 8.

In September, the case was continued again, on a joint motion, with a new jury trial date of November 14. CP 12. Speedy trial was to expire December 14, 2017. CP 12.

Defense counsel was unable to interview the alleged victim, and was forced on November 13, 2017, to move for a continuance. CP 24. The State also had not provided other discovery. CP 24. The new trial date was set for December 12, and speedy trial was to expire January 11, 2018. CP 24.

On December 1, 2017, the trial court granted a continuance because "officer Bradley (3.5) is unavailable for training 12-11-12-15 and officer Robillard is on vacation [until December 24]" and the prosecutor planned a vacation until January 6. CP 27. The defendant objected to the continuance. CP 27. In all caps on the bottom of the order, the trial court stamped "NO MORE CONTINUANCES." CP 27. The new trial date was January 17, 2018, and speedy trial was set to expire February 16, 2018. CP 27.

The parties appeared in court again on January 5 for a trial readiness hearing. The State indicated that it would amend to add one count of Assault 4, and defense had no objection to adding the

misdemeanor charge. CP 28. Trial was scheduled for January 24. CP 30. The State told the Court all subpoenas had been served. CP 29. The speedy trial deadline was pushed out to February 23, over Celaya's objection. CP33. The State and defense both estimated a trial length of 3-4 days. CP 31.

On the eve of trial, January 23, defense counsel spent "all night preparing for trial" expecting trial the next day. RP 2/8 at 7. On January 24, however, the State moved to continue the trial, stating that counsel was "out on another trial." CP 35. A new trial date of February 8 was assigned. On the bottom of the order, the court again stamped in all caps "NO MORE CONTINUANCES." CP 35. On February 8, 2018, the case would be 232 days old, having been continued 6 times. CP 63.

On the trial date, February 8, 2018, the State presented an amended information. The defense objected to amending information on day of trial. RP 2/8 at 4. Defense counsel argued that "the State [was] trying to substantially change the course of the facts of this case based upon the amendment of the Information." RP 2/8 at 4. The defense noted that the alleged phone calls occurred in June 2017. RP 2/8 at 4-5.

The State sought to add a felony count of Tampering with a Witness (domestic violence related), RP 2/8 at 4, not just the Assault 4 charge that it indicated it would add on January 5; it also added a misdemeanor count of Violation of a No Contact Order (domestic violence related). The State made no attempt to argue that the late amendment to

add the VNCO charge was related to any need to find witnesses or additional information.

Defense counsel "strenuously object[ed] to the amending of the Information" because the allegations "substantially change[d]" the case and would "bring great difficulty in the defense that we had anticipated putting forth." RP 2/8 at 8. While the State had apparently sent the Amended Information earlier that week, RP 2/8 at 8, defense counsel explained that he could not "prepare for this trial effectively." RP 2/8 at 8.

In addition to the new charges, defense counsel objected to late disclosure of a motion to use Celaya's criminal history and a host of new motions in limine. RP 2/8 at 9.

The State said it sent a draft amended complaint to defense counsel on January 30. RP 2/8 at 11. Defense counsel responded that the State had never told counsel orally about the amendment, RP 2/8 at 7, and then explained that the first he had seen the email containing the amended complaint draft was on Sunday, February 4, RP 2/8 at 7, and he first had a chance to review it on Monday, February 5. RP 2/8 at 8. Defense counsel had pinkeye, and then his son had surgery, keeping him out of the office Tuesday-Friday, January 30 to February 2, and got back to the office on February 5. RP 4/8 at 7-8.

Neither side mentioned that Pace had been served with a subpoena to testify in this matter on August 21, September 21, November 15, December 6, and January 24, 2018.

The State told the trial court that "The reason why the State couldn't add charges before is we didn't know whether or not we could secure the cooperation of Mr. Pace," and that is an "essential element to the Witness Tampering to know whether or not it was actually conveyed to Ms. Jeffries." RP 2/8 at 11.

The trial court found no prosecutorial misconduct. The court granted the motion to amend and accepted the Amended Information for filing. RP 2/8 at 35.

In response to the trial court granting the motion to amend the charges, Celaya requested a continuance to allow time to prepare to defend against the new charges, which the court granted. CP 65. As the State noted, defense counsel made "a fairly thorough record that he is not going to be able to proceed effectively on the new charges." RP 2/8 at 39. Defense counsel asked for 18 days to prepare to defend against the new charges. RP 2/8 at 39.

B. Trial proceedings

After several more delays, trial began on April 17, 2018. Although the State obtained a continuance in December based on the need for a 3.5 hearing, the State now admitted there were no statements subject to 3.5. RP at 4/17 111.

On April 23, 2018, the State called Brien Pace. CP 352. Pace was the witness the State relied on to justify amending the complaint on the day of trial on February 8, 2018. RP 2/18 at 24-7.

Regarding the alleged incident of Celaya assaulting Jeffries, Pace testified as follows:

Q. Did you tell them [the police who came to the house] whether or not you had seen anything regarding the incident?

A. No. I told them I didn't see anything, because I didn't.

RP 4/23 at 153.

Regarding the witness tampering charge, Pace testified that "I just told [Jeffries] that I wanted to know if he could get the charges dropped and get out of there. That was it. You guys got it on tape." 4/23 at 153.

On April 24, 2018, the State called Torvald Pearson. CP 353. Pearson testified how jail calls were recorded and that Celaya had an individual PIN assigned to him that allowed the jail to track which calls he made. RP 4/24 at 126-27. He testified that on August 11, 2017, he made what would become Exhibit 14 at trial, a CD of the phone call containing the alleged witness tampering. RP 4/24 at 132. In ruling on the admissibility of the exhibit, the trial court noted that not only did the call come from Celaya's pin, but that Celaya identified himself on the call. RP 4/24 at 142. Pearson also testified that if an inmate tried to swap a PIN and another inmate tried to use the PIN from outside his unit, it would not work. RP 4/24 at 147.

On April 25, 2018, the parties closed. CP 354.

On April 26, 2018, the jury began deliberations and reached a verdict. CP 354-55. The jury found Celaya not guilty of Assault in the Second Degree, CP 340, guilty of felony harassment, guilty of two counts

of Assault 4, guilty of a violating a no contact order, guilty of tampering with a witness, and found by special verdict that Celaya and Jeffries were members of the same household for each count. CP 333-346.

Where the State had estimated a 3-4 trial prior to amending the charges, the trial proceedings took seven court days, plus sentencing.

C. Sentencing

Sentencing occurred on June 19, 2018. CP 408. Celaya received an exceptional sentence, with an upward departure for the Witness Tampering charge resulting in an additional 24 months in prison.

D. Direct appeal

The court of appeals affirmed the sentence on April 7, 2020, in an unpublished opinion. This Court held that, after the State misrepresented the law in asking for a continuance in February, "Celaya's counsel took no further action and did not file a motion to dismiss under CrR 8.3(b). Because Celaya abandoned the CrR 8.3(b) issue below, Celaya waived CrR 8.3(b) as a basis for review on appeal." *State v. Celaya*, No. 52063-0-II, 2020 Wash. App. Lexis 874, at *9 (Apr. 7, 2020). The Court also refused to review the speedy trial issue because it was not raised before the trial court. *Id.* at *12. Finally, the Court rejected Celaya's contention, in a Statement of Additional Grounds, that he received ineffective assistance of counsel based on "failure to investigate" and "trial strategy." *Id.* at *12-13.

A petition for review to the Washington Supreme Court was declined, and the Court issued its Mandate on September 14, 2020.

ARGUMENT

Trial counsel failed to move to dismiss despite manifest government misconduct, and failed to move to dismiss despite the violation of Celaya's speedy trial rights. There could be no strategic reason to fail to move to dismiss when the State misstated the law and gained an advantage based on that misstatement—the State added a witness tampering charge; Celaya received a two-year sentence on the late-added witness tampering charge. Long-standing case law supported dismissal, but trial counsel failed to cite that case law, failed to notice the State's misstatement of the law regarding the amended charges, and failed to move to dismiss. This ineffective assistance of counsel prejudiced Celaya. The cases hold that where, as here, a late amendment forces a defendant to choose between speedy trial rights and the right to prepare a defense, the remedy is dismissal of all charges, not just the late amended charge. The Court should grant the PRP and dismiss all charges against Celaya.

A. Standard of review

This Court did not consider Celaya's claims on the merits, and instead determined that the claims had been waived. Since the claims have not been reviewed, Celaya need not make the threshold showing of actual prejudice or complete miscarriage of justice, and the claims should be reviewed under the unlawful detainer standard of RAP 16.4(c)(2), (3), (5),

(6). Restraint is unlawful when, among other things, "[t]he conviction was obtained or the sentence or other order . . . was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington." RAP 16.4(c)(2).

"A petitioner may request relief through a PRP when he is under an unlawful restraint." *In re Monschke*, , 160 Wn. App. 479, 488, 251 P.3d 884 (2010) (citing RAP 16.4(a)-(c)). "But when a petition 'raises issues that were afforded no previous opportunity for judicial review, . . . the petitioner need not make the threshold showing of actual prejudice or complete miscarriage of justice." *In re Pierce*, 173 Wn.2d 372, 378, 268 P.3d 907 (2011) (quoting *In re Gentry*, 170 Wn.2d 711, 714, 245 P.3d 766 (2010)). "It is enough if the petitioner can demonstrate unlawful restraint under RAP 16.4." *Id.* (citing *In re Gentry*).

The petitioner must prove the error by a preponderance of the evidence. *In re Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). In addition, "[t]he petitioner must support the petition with facts or evidence and may not rely solely on conclusory allegations." *Monschke*, 160 Wn. App. at 488; RAP 16.7(a)(2)(i).

If a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice. *In re Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012). This Court "may consider a new ground for an ineffective assistance of counsel claim for the first time on collateral review." *In re Khan*, 184 Wn.2d 679, 689, 363 P.3d 577 (2015).

B. Celaya received ineffective assistance of counsel when counsel failed to move for dismissal

Failure to move to dismiss, when the State's misconduct was plain and many long-standing cases supported dismissal, was ineffective assistance of counsel. Since the failure to move to dismiss allowed additional charges to be tried and these charges led to additional time for Celaya, he was plainly prejudiced.

1. Ineffective assistance of counsel background principles

The right to effective representation is well-established. Individuals have the right to effective assistance of counsel at all stages of a criminal case. U.S. Const. Amend. VI; Const. Art. I, 22. To show ineffective assistance of counsel, Celaya must show that trial counsel's performance was deficient and that this deficient performance resulted in actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

2. Where there is no strategic reason not to move to dismiss, a defendant rebuts the presumption of reasonable performance

Celaya's trial counsel submitted a declaration under oath stating that he "did not have a strategic reason not to move for dismissal at the hearing on February 8, 2018." Appendix at ¶ 4. Nor did counsel have a strategic reason not to move for dismissal after the hearing. *Id.* ¶ 4. Trial counsel never brought the relevant case law to the trial court's attention. *Id.* ¶ 6.

A criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d

126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Here, "no sound strategic or tactical reason is evident for counsel's failure to move for dismissal . . ." *State v. Canfield*, 13 Wn. App. 2d 410, 417, 463 P.3d 755, 759 (2020). "Moreover, no possible advantage could flow" to Celaya from counsel's failure to move for dismissal. *Id.* (internal citations and punctuation omitted). Celaya's failure to move to dismiss "simply cannot be attributed to improvident trial strategy or misguided tactics." *Id.* (internal citations and punctuation omitted). Here, "counsel's representation was deficient." *Id.* The "error was prejudicial because [Celaya] received additional punishment for the new charges." *State v. Canfield*, 13 Wn. App. 2d at 417.

3. Celaya can show prejudice because the trial court would have followed the law and dismissed the charges

Celaya must also show that the trial court would have granted the motion. *State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776 (2011) (counsel has no duty to pursue strategies that reasonably appear unlikely to succeed). That is, to establish prejudice, Celaya must show a reasonable probability that the outcome would have differed absent the deficient performance. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Thomas*, 109 Wn.2d at 226; *Garrett*, 124 Wn.2d at 519. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law" and must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like." *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260, 1269 (2011)(citing *Strickland*, 466 U.S. at 694-95). Since cases like *Michielli* are clear, Celaya shows prejudice because the court would have followed precedent and dismissed the charges.

C. Celaya's constitutional right to a speedy trial was violated

The Government's actions were misconduct, and Celaya's counsel's failure to move to dismiss was error that prejudiced Celaya.

1. A speedy trial violation is an error of constitutional dimension

The right to a speedy trial is a fundamental constitutional protection, and unless "a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009) (internal punctuation and citation omitted). The right to a speedy trial "'is as fundamental as any of the rights secured by the Sixth Amendment.'" *Barker v. Wingo*, 407 U.S. 514, 515 n. 2 (1972) (quoting *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967)). If a defendant's constitutional right to

a speedy trial is violated, the remedy is dismissal of the charges with prejudice. *Id.* at 522.

2. Forcing Celaya to choose between a speedy trial and the right to prepare a defense violated his rights

After about sixth months of waiting and continuances, Celaya began objecting to continuances in November 2017. He was incarcerated the entire time he waited for trial. The continuances from November forward allowed the State to add additional charges—charges that the State could have brought in August, when it prepared as exhibit the call that was the basis for the Witness Tampering charge. RP 4/24 at 132. This Witness Tampering charge resulted in additional time in prison. RP 6/19 at 29 (court specifying an additional 24 months imprisonment for the Witness Tampering charge). By amending on the day of trial, the State forced Celaya to choose between a speedy trial and the right to prepare a defense. The amended charges made the case more complicated to defend: from an estimated 3-4 trial days prior to amendment, CP 30, to 7 days of trial after amendment. Celaya's trial was illegally delayed and that delay prejudiced him.

Celaya's right to a speedy trial was violated as a result of governmental misconduct. The government's misconduct need not be evil or dishonest. Simple mismanagement is sufficient. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

On the trial date, February 8, 2018, the State presented an amended information. The defense objected to amending information on day of trial. RP 2/8 at 4.

The State engaged in misconduct because there was no reason that the charges could not have been added earlier. The State had the recording of the call burned onto a CD that was used at trial in August 2017. RP 4/24 at 132. It is reasonable to assume that the State had listened to the recording prior to asking to have it made into an exhibit. This recording was all evidence the State needed, and all the evidence it relied on, for the Witness Tampering charge. CP 326; RP 4/25 at 244; 248.

The newly added charges, including a felony charge, forced Celaya into a position where he had to choose between exercising his speedy trial rights and his right to have a prepared defense.

The State doubled the complexity of the trial, from a "3-4" day trial to a 7-day trial. After the trial court allowed the amendment, defense counsel asked for over two weeks to prepare to defend the new charges. RP 2/8 at 39. Given the difficulty the State claimed it had contacting Pace for an interview, it was reasonable for the defense to anticipate needing significant time to interview the witness and do other trial preparation. The time defense counsel needed was significantly longer than the 6 business days prior to trial that the State sent a draft amended complaint. In the end, defense counsel only saw the amended complaint, at the earliest, on Sunday February 4. RP 2/8 at 7. Defense counsel stated he first reviewed the amended charges on Monday, February 5. RP 2/8 at 8.

Defense counsel "strenuously object[ed] to the amending of the Information" because the allegations "substantially change[d]" the case and would "bring great difficulty in the defense that we had anticipated putting forth." RP 2/8 at 8. The State conceded that defense counsel made "a fairly thorough record that he is not going to be able to proceed effectively on the new charges." RP 2/8 at 39. But counsel did not move for a dismissal, either orally or by motion.

The State defended its actions, telling the trial court that "I'm not going to be able to prove that witness tampering without Brian Pace and without—because he is the one that conveys the message from that call to the alleged victim." RP 2/8 at 23. But the To Convict Instruction properly stated the law, and did not require that any message be conveyed. CP 326 Instruction 31.

And in closing, the State told the jury that Jeffries' and Torvald's testimony was sufficient to convict:

> So now let's talk about the second set of crimes: Violation of a No-Contact Order and Tampering. We know that these happened because of Ms. Jeffries' testimony and because of call logs that you heard.

RP 4/25 at 244.

The State further told the jury in closing that the threat did not need to be communicated to Jeffries:

> He just has to attempt. . . . I'll point out that we don't even have to show that Mr. Pace relayed that message . . .

RP 4/25 at 248.

The State knew that it could bring the Witness Tampering change in August, because it was then that Pearson prepared his exhibit. The State should have known in August that it did not need Pace to testify. Celaya's counsel also should have known that the State was misrepresenting the law to the trial court to justify the continuance.

The State here failed to learn the nature of the evidence and examine the elements of the charges, and asked for continuances and late amendments to charges based on that ignorance. That is mismanagement that amounts to misconduct.

The cases hold that Celaya showed prejudice. Thus Celaya "was prejudiced in that he was forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges brought three business days before the scheduled trial." *Michielli*, 132 Wn.2d at 244.

The holding in *Michielli* was recently reaffirmed by our Supreme Court: "a defendant is prejudiced when delayed disclosure interjects 'new facts' shortly before litigation, forcing him to choose between his right to a speedy trial and to be represented by an adequately prepared attorney." *State v. Salgado-Mendoza*, 189 Wn.2d 420, 432, 436, 403 P.3d 45 (2017).

Put another way, if the State had not violated Celaya's right to a speedy trial through late amendment, trial would have proceeded without a charge that resulted in additional 24 months of confinement. The amended charge was not part of the same situation that led to the domestic

violence charges, but arose later. Amending to add that charge as speedy trial was expiring—a delay caused by government mismanagement—forced Celaya into a choice *Michielli* holds is prejudicial.

Through its misconduct, the State may not force a defendant to choose between constitutional protections. But Celaya was forced to choose between constitutional protections, and this Court's cases make clear that having to choose between rights because of government misconduct is prejudice.

D. The State's various arguments fail

The State failed to discuss the relevant law on direct appeal. The State's additional arguments are unpersuasive, unsupported by case law, and serve only to preserve a verdict that was obtained in violation of Celaya's rights.

1. Misstating the law is not good cause for a continuance

On direct appeal, the State maintained that the misstatement of the need for Pace's testimony was "good cause." Answering br. at 10. That argument is foreclosed by *Michielli*: the Government may not misstate the law, rely on that misstatement, and get a late amendment that adds charges based on that misstatement.

2. Celaya was forced to choose between his right to prepare a defense and his right to a speedy trial, and so the extension of the speedy trial date does support the State's arguments

The State also argued that speedy trial had not run so there was no prejudice. Answering br. at 26. That misstates the record.

In December, the trial court, over Celaya's objection, moved the speedy trial expiration to February 16. CP 27. In January, over Celaya's objection, the trial court moved speedy to trial from February 16 to March 10. Thus March 10 only became the speedy trial expiration after the State mismanaged the case and obtained unwarranted continuances.

The extension of speedy trial to March 10, which occurred on January 24 and was done over Celaya's objection, CP 35, was made without reference to filing new charges and was unnecessary. Trial was scheduled for January 24 (already over Celaya's objection), Celaya was ready for trial on January 24, and the purported need to move the trial date to accommodate the prosecutor's schedule did not justify extending speedy trial. And the State did not even contact the witness it would eventually use to justify its late amendment on until January 29. RP 2/8 at 11. As discussed above, Celaya objected to the December and January continuances, and those continuances were the result of the State's mismanagement, such has not having witnesses available for interviews. CP 24.

Just as in *Michielli*, the "State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice" sufficient to dismiss the charges. 132 Wn.2d at 145.

Under the State's theory, the State can obtain continuances despite mismanagement and then claim no speedy trial violation because

the trial court was tricked into granting the continuances. State br. at 29. That would be a terrible rule, of course, because it would encourage the State to play games, withhold evidence and charges, and encourage trial by ambush.

Fortunately, the State is wrong, as shown by *Michielli*, *Vernon G.*, and *Earl.*

A defendant being "forced to waive his speedy trial right is not a trivial event." *Michielli*, 132 Wn.2d at 245. The court may only allow an amendment of the information if the court finds that "substantial rights of the defendant are not prejudiced." CrR 2.1(d). "An amendment to an information at trial may prejudice a defendant by leaving him without adequate time to prepare a defense to a new charge." *State v. Purdom*, 106 Wn.2d 745, 749, 725 P.2d 622 (1986), quoting *State v. Jones*, 26 Wn. App. 1, 6, 612 P.2d 404 (1980).

The "State may not, without excuse, compel defendants to choose between their right to assistance by an attorney who has had an opportunity to adequately prepare for trial, and their right to a speedy trial." *State v. Ralph Vernon G.*, 90 Wn. App. 16, 21, 950 P.2d 971 (1998). It is unfair for the State to wait until days before trial to file an amended information based on information long-known by the State. *Michielli*, 132 Wn.2d at 246.

In *Vernon G.*, the record showed that the "State was aware of the factual basis for the charges for nearly a month," and the court held that

delaying in bringing the charges until shortly before trial violated the defendants speedy trial rights and reversed. 90 Wn. App. at 18.

In *Earl*, the State waited nine months to amend, which it did on the day of trial. *State v. Earl*, 97 Wn. App. 408, 410, 984 P.2d 427 (1999). The *Earl* court reversed on all charges, both the original count and the amended count. Id. at 415-17.

Here, there can be no doubt that the State was aware of the information it needed to amend the complaint well before February 8. Pace's testimony was unnecessary to bring or prove the Witness Tampering charge, because the phone call showing Celaya's attempt would be sufficient to convict—which is precisely what the State argued to the jury. RP 4/25 at 248.

As the *Vernon G.* court explained, when a defendant is forced to request a continuance to prepare to address an untimely amended information, the court looks at the time for trial without any exception for the time of the continuance, and if the time for trial has expired, the remedy is dismissal. *Ralph Vernon G.*, 90 Wn. App. 22. Here, the speedy trial time expired well before the trial started on April 17. Again, Celaya's speedy trial time was continued in December and January over his objection, CP 27, 33, and based on government mismanagement.

The State also argued below that Celaya was not prejudiced. Answering br. at 29. But the case law explains that Celaya "was prejudiced in that he was forced to waive his speedy trial right and ask for a

continuance to prepare for the surprise charges brought three business days [here, on the day of] the scheduled trial." *Michielli*, 132 Wn.2d at 244.

The State's sole justification for amending on the day of trial—the need for Pace's testimony—evidenced mismanagement. Pace's testimony was not necessary because it is not necessary for a threat to actually be communicated to the victim. Comment to WPIC 115.81 Tampering with a Witness, Elements (11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 115.81 (4th Ed)); *State v. Haggin*, 195 Wn. App. 315, 324, 381 P .3d 137 (2016).

E. Celaya is unlawfully restrained

Celaya's conviction violates the United States and Washington constitutions because his speedy trial right was violated and he was forced to choose between his speedy trial right and his right to present a defense. RAP 16.4(c)(2).

Celaya presents new material facts in the declaration of trial counsel, who affirms that the failure to move for dismissal was not made for strategic reasons. RAP 16.4(c)(3); appendix.

Celaya presents other grounds for collateral attack by alleging ineffective assistance of counsel. RAP 16.4(c)(5).

Celaya also shows other grounds exist to challenge the legality of the conviction because he shows that, under long-standing precedent, he was forced to choose between his speedy trial right and his right to prepare a defense. RAP 16.4(c)(7).s

Conclusion

The Court should grant the Petition.

Respectfully submitted on September 30, 2020

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WSBA #41020
Law Office of Harry Williams
P.O. Box 22438
Seattle, Washington 98122
harry@harrywilliamslaw.com
206.451.7195
Attorney for Fernando Celaya

Declaration of Counsel

I declare under penalty of perjury that I have examined this petition and to the best of my knowledge and belief it is true and correct.

September 30 , 2020.

s/Harry Williams

Seattle, Washington

Certificate of Service

On September 30, 2020, I served all parties by electronic service, and served a paper copy by U.S. mail to

Fernando Celaya, #325580
Stafford Creek CC
191 ConstantineWay
Aberdeen, WA 98520

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated September 30, 2020 in Seattle, Washington.

s/Harry Williams IV, WSBA #41020

Appendix 1

No. 48378-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

In re Personal Restraint Petition of Fernando Celaya

DECLARATION OF NICHOLAS R. ANDREWS

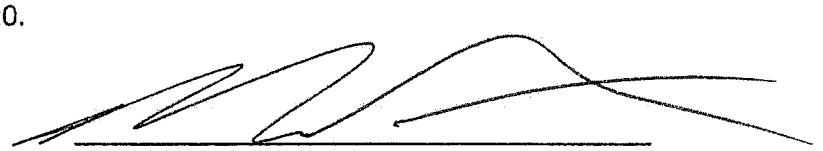
Harry Williams IV
WSBA #41020
LAW OFFICE OF HARRY WILLIAMS
P.O. Box 22438
Seattle, Washington 98122
harry@harrywilliamslaw.com
206.451.7195
Attorney for Fernando Celaya

I, Nicholas R. Andrews, declares under penalty of perjury that I am over 18 years old and am competent to give the following testimony.

1. I was Fernando Celaya's counsel in the trial court in Pierce County, 17-1-02378-9.
2. I objected repeatedly to the government's misconduct in this case , including on February 8, 2018.
3. I did not move to dismiss the case in February 2018.
4. I did not have a strategic reason not to move for dismissal at the hearing on February 8, 2018.
5. Similarly, after the hearing, I did not have a strategic reason not to move for dismissal based on the State's representations at the hearing on February 8, 2018.
6. I never brought *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997), and/or cases similar to *Michielli*, to the trial court's attention.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT:

DATED this 28th day of September, 2020.



NICHOLAS R. ANDREWS, WSBA #40441
Attorney at Law

Appendix 2

STATEMENT OF FINANCES

If you cannot afford to pay the $250 filing fee or cannot afford to pay an attorney to help you, fill out this form. If you have enough money for these, do not fill this part of the form. If currently in confinement you will need to attach a copy of your prison finance statement.

1. I ask the court to file this without making me pay the $250 filing fee because I am so poor and cannot pay the fee.

2. I have $____0____ in my prison or institution account.

3. I do not ask the court to appoint a lawyer for me because I am so poor and cannot afford to pay a lawyer. My lawyer is representing me pro bono.

4. I am ____ am not _X_ employed. My salary or wages amount to $_____a month. My employer is _____.
Name and address of employer

5. During the past 12 months I did _____ did not _X_ get any money from a business, profession or other form of self-employment. (If I did, it was _____
Type of self-employment
And the total income I received was $_____.

6. During the past 12 months I:

Did ___ Did Not _X_ Receive any rent payments. If so, the total I received was $_____

Did ___ Did Not _X_ Receive any interest. If so, the total I received was $_____

Did ___ Did Not _X_ Receive any dividends. If so, the total I received was $_____

Did ___ Did Not _X_ Receive any other money. If so the total I received was $_____

Do ___ Do Not _X_ Have any cash except as said in question 2 of Statement of Finances. If so the total amount of cash I have is $_____.

Do ___ Do Not _X_ Have any savings or checking accounts. If so, the total amount in all accounts is $_____

Do ____Do Not _X_ Own stocks, bonds or notes. If so, their total value is: $_____.

7. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what eat item or property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

Items Value

8. I am ____ am not X married. If I am married, my wife or husband's name and address is:

9. All of the persons who need me to support them are listed below:

Name & Address	Relationship	Age
N/A		

10. All the bills I owe are listed here:

Name & Address of Creditor	Amount
N/A	

I declare under penalty of perjury of the laws of Washington that I have examined this financial information and to the best of my knowledge and belief it is true and correct.

DATED This 24 day of September, 2020.

Fernando Celaya

Signed in Aberdeen, Washington
City

Cleveland, Kim

From: Harry Williams <harry@harrywilliamslaw.com>
Sent: Wednesday, September 30, 2020 1:33 PM
To: coa2
Subject: PRP filing
Attachments: PRP FINAL FILING.pdf; FILING Indigency request.pdf

Hi --

I have tried to get this filed through the portal, but have not been able to file it. I have left a message for the help desk and also left a message through the e-service center, but have not heard back.

I am attaching a PRP and a motion to file IFP.

Thank you,

Harry Williams Law
PO Box 22438
Seattle WA 98122